



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

NOV 07 2014

REPLY TO THE ATTENTION OF:

David F. Lisner
Cravath, Swaine & Moore LLP
825 Eighth Avenue
New York, New York 10019

Re: Subpoena for Deposition Testimony and Production of Documents in Georgia-Pacific Consumer Products, LP, et al. v. NCR Corporation, et al., United States District Court for the Western District of Michigan, Civil Action No. 1:11-cv-483

Dear Mr. Lisner:

On November 3, 2014, the United States Environmental Protection Agency received a subpoena from your office in the above referenced matter.¹ Your subpoena seeks documents and deposition testimony from an EPA Region 5 employee James Saric. For the reasons set forth below, EPA hereby denies approval to comply with the subpoena under 40 C.F.R. Part 2, Subpart C and other legal authorities, including Sections 113(h) and 113 (j) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9613(h) and 9613(j).

As you are aware, EPA is not a party to the suit. The suit at issue has been brought under Section 113(f) of CERCLA by Georgia-Pacific Consumer Products, LP, to resolve contribution claims against multiple non-governmental parties including your client NCR Corporation (NCR). EPA regulations at 40 C.F.R. § 2.401(c) ensure that "employees' official time is used only for official purposes, to maintain the impartiality of EPA among private litigants, to ensure that public funds are not used for private purposes and to establish procedures for approving testimony or production of documents when clearly in the interests of EPA." The validity of federal agency regulations restricting the testimony of federal employees and the production of documents has been upheld by the United States Supreme Court. *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951). As stated in 40 C.F.R. § 2.402(b), no EPA employee may provide testimony or produce documents in any proceeding to which this subpart applies concerning information acquired in the course of performing official duties or because of the employee's official relationship with EPA, unless authorized by the General Counsel or his designee.

As the General Counsel's designee, I have reviewed the subpoena and recommendation of Mr. Saric's supervisor and have consulted with the Regional Administrator for Region 5 of EPA. On the basis of my review and consultation, I do not authorize EPA employee James Saric to

¹ James Saric accepted service of the subpoena on Saturday, November 1, 2014 at his residence during nonbusiness hours.

provide testimony because I conclude compliance with the subpoena would not clearly be in the interests of EPA. 40 C.F.R. § 2.404(a). The subpoena imposes an undue burden upon EPA to use one or more EPA employees' official time to provide testimony and documents. Likewise, the subpoena imposes an undue burden upon EPA by requiring public funds—in the form of Mr. Saric's official time—be spent for private purposes. Moreover, to interject the United States into private party litigation of this type would set a precedent for the Agency that would undoubtedly lead to numerous similar requests and interfere with the official duties of Agency personnel, which as a matter of course, do not include testifying in private lawsuits to which the United States is not a party. As emphasized in one leading CERCLA case, “[q]uestions of liability [under CERCLA] can be put at issue in federal court by disputing private parties--without any government involvement.” *Kelley v. EPA*, 15 F.3d 1100, 1104 (D.C. Cir. 1994).

Furthermore, providing the testimony sought here is not clearly in the interests of EPA because most if not all of the information can be found in the administrative record for the Site and other public records. EPA should not be required to undertake the substantial burden of producing a witness to provide information that is available through less burdensome means. See 40 C.F.R. § 2.406 (Requests for authenticated copies of EPA documents); 50 Fed. Reg. 32,386 (Aug. 9, 1985) (“Since official actions and policies can be best be proved by EPA records, and since this regulation provides that it is generally inappropriate for employees to appear as witnesses to discuss the background of EPA policies and actions in private litigation, this regulation provides that copies of documents will be authenticated upon request.”)

In addition, I have determined that providing the testimony sought by the subpoenas here is not clearly in the interests of EPA because it risks improper exposure of the Agency's ongoing deliberations and improper judicial review of the Agency's actions. To the extent that the testimony sought relates to pre-decisional Agency information, that information is not subject to judicial review and it may be protected and immune from discovery under the government's deliberative process privilege. In addition, CERCLA Sections 113(h) and 113(j) limit the timing and scope of judicial review of challenges of EPA's removal and remedial actions and orders, with such review to be confined and based on the administrative record compiled by EPA. Thus, I find that allowing the testimony sought would be in direct contravention of the judicial review and record review limitations in Sections 113(h) and 113(j) of CERCLA.

Finally, I do not authorize EPA employee James Saric to provide testimony in this matter because EPA's participation in this proceeding could undermine EPA's efforts to maintain impartiality among the private litigants who are involved in this case. See 40 C.F.R. § 2.401(c) (Purpose of EPA's Touhy regulations is, in part, “to maintain the impartiality of EPA among private litigants...”).

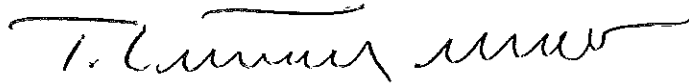
Under 40 C.F.R. § 2.405, your subpoena for documents is treated in accordance with the Freedom of Information Act (FOIA) and EPA's applicable regulations. Your office previously submitted a FOIA request to EPA's Region 5 office for the same type of information sought by the subpoena. EPA is currently responding to your FOIA request (EPA-R5-2014-003588) and has responded to a previous FOIA request submitted on behalf of NCR in 2011 (EPA-R5-2011-

77811), which also sought information that is responsive to your subpoena. Unless you inform EPA otherwise, EPA will treat the subpoena as seeking records which are duplicative of the referenced FOIA requests and will not create a new FOIA identification number for documents responsive to only this subpoena.

In sum, I find that it is not clearly in EPA's interest to produce Mr. Saric or documents in response to your subpoena for deposition in *Georgia-Pacific Consumer Products, et al. v. NCR Corporation, et al.* 1:11-cv-483 (W.D. Mich.). To do so would be overly burdensome, likely favor one or the other parties in the litigation, and contravene regulatory and statutory proscriptions. As such, EPA does not authorize James Saric to testify in the above-referenced matter or produce documents.

Thank you for your courtesy and cooperation in this matter. If you have any questions, please contact Associate Regional Counsel Nicole Wood-Chi at (312) 886-0664.

Sincerely,

A handwritten signature in black ink, appearing to read "T. L. Kaplan", written over a horizontal line.

for: Robert A. Kaplan
Regional Counsel

cc (via e-mail):

Nicole Wood-Chi
James Saric
Andrew Hanson (U.S. DOJ)